SUPREME COURT, U. S.

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No. 72-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

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ARGUMENT

In *Labor Board* v. *Le Tourneau Co.*, 324 U.S. 793, 796-797, 802-804 (decided with *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793), this Court held

that a plant rule, such as that here, imposing a blanket prohibition on employee distribution of union literature in the non-working areas of their plant and during non-working time, unlawfully interferes with the § 7 right "to self-organization, to form, join, or assist labor organizations" in violation of § 8(a)(1) of the National Labor Relations Act, as amended, unless justified by "special circumstances [that] make the rule necessary to maintain production or discipline."

The Company does not challenge *Le Tourneau*. Nor does it claim that its absolute ban on such distributions is justified by the "special circumstances" referred to there. Instead the Company would distinguish *Le Tourneau* on the ground that its holding was "derived from and applicable to [employer] unilaterally imposed no-distribution rules," whereas in this case the no-distribution rule is encompassed in a collective agreement between the Company and the employees' authorized representative. The basis offered for this distinction is that the agreement works a valid "waiver" of the employee right. Co. Br. p. 4. The Company's waiver argument rests on the premise that "numerous other important rights of employees protected by Section 7 may be waived", and that "there is no basis whatever to be found in the Act for [a] distinction" pursuant to which "distribution rights secured by that same Section 7 may not be waived by the statutorily authorized bargaining representative." Co. Br. p. 18.

The Board's response (Bd. Br. p. 8) is to acknowledge that "the employees' representative, the Union, is authorized to engage in collective bargaining on their behalf and to waive certain rights—for example, the right to strike," since "union and employee interests

are one in the context of concerted efforts to achieve economic advantage;" but that:

> "By contrast, the rights to distribute materials and to solicit support in organizing for collective bargaining are rights that individual employees exercise in choosing whether to be represented by a union, and in re-evaluating their bargaining agent. '[T]he rationale of allowing waiver * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse.' "

As our opening brief shows, we agree with the Board that the § 7 right recognized in *Le Tourneau* can not be waived, but for different reasons. And, we, of course, disagree with the Company's reasoning and with the conclusion it would draw. This reply brief is therefore devoted to demonstrating that neither the Board, nor the Company, analyze the problem presented correctly.

1. We begin from the proposition, implicit in the fundamental principle that sovereignty resides in Congress, rather than in employers, unions or any other private party that:

> "[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. * * * Where a private right is granted in the public nterest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704.

See also, e.g., *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356; *Schulte* v. *Gangi*, 328 U.S. 108; *Lear Inc.* v. *Adkins*, 395 U.S. 653.

(a) The statutory policy here, as stated in *Le Tourneau*, is to protect the right of employees to utilize their non-working time to distribute union literature so long as they do so in non-working areas of the plant at which they are employed.

The major purpose of the Act is, in the words of § 1, to "encourag[e] the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing." Accordingly, employer action which would "weaken or destroy" § 7 rights (*NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24), without "legitimate and substantial business justification" (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378) is prohibited. The Act was intended to, and has the effect of, reducing the common law powers and perquisites of employers. The most notable instance is the restriction it imposes on their right to hire and fire for good reason, bad reason or no reason at all. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46. But this is not the full extent of the Act's effect.

The Board and this Court have been quick to perceive that it was in Congress's contemplation that "inconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining." *Republic Aviation*, 324 U.S. at 802 n. 8. In the NLRA context as in maritime law, common law property concepts, whose roots may be

traced "to a heritage of feudalism" are not controlling "in an industrialized urban society." *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 631-632. The rights of an employer who "opens up his property" to employees covered by the Act are "circumscribed by [their] statutory * * * rights * * *. Cf. *Republic Aviation Corp.* v. *National Labor Relations Bd.,* 324 U.S. 793, 796." *Marsh* v. *Alabama,* 326 U.S. 501, 506. For "even constitutionally protected rights * * * may not be used as levers for obtaining objectives proscribed by" federal law. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 576 n. 11.

In short, as expressly recognized in *Thomas* v. *Collins,* 323 U.S. 516, 533-534, § 7 is the direct analogue of the First Amendment. And the holding in *Le Tourneau* follows directly from that of *Schneider* v. *State,* 308 U.S. 147, 161. Since the employer has of his own volition opened up his property to his employees, their statutory right to distribute union literature during non-working time and in non-working areas, is the same as the constitutional right of every citizen to distribute leaflets on public thoroughfares.

(b) *Le Tourneau* struck a balance between the employee right to distribute union literature and the employer's property and disciplinary rights. The Company argues that there is an added factor in the balance here—the collective agreement encompassing the blanket no-distribution rule. Co. Br. pp. 12-18, 21-30.[1]

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[1] While acknowledging that the availability of "alternative means of communications" cannot validate an otherwise invalid unilaterally imposed blanket no-distribution rule, the Company argues that such other means of communication are relevant where

To be sure, it is a policy of the Act, as stated in § 1, "to encourage the 'practice and procedure of collective bargaining' as a means of resolving labor disputes." While this Court has been solicitous of this policy of free collective bargaining (e.g. *Porter Co.* v. *NLRB*, 397 U.S. 99) it has squarely rejected the view that §§ 8(a)(5) & (d) can be read to mean that Con-

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the rule is embodied in a collective agreement. This is wrong for two reasons.

First, as we show in the text, the fact that a no-distribution rule is contained in a collective agreement does not change the calculus of competing considerations. Second, this argument rests on a misreading of this Court's decisions in *Babcock & Wilcox* v. *Labor Board*, 351 U.S. 105 and *Labor Board* v. *United Steelworkers*, 357 U.S. 357. As Judge Clark explained for the Second Circuit in *NLRB* v. *United Aircraft Corp., Pratt & Whitney Air Div.*, 324 F.2d 128, 131, cert. denied 376 U.S. 951:

> "Republic Aviation Corp. v. N. L. R. B., supra, 324 U.S. 793, 803, n. 10, with its clear approval of Peyton Packing Co., supra, 49 NLRB 828, 843-844, is strong authority for the position that the consideration of available alternatives is not required. N. L. R. B. v. Babcock & Wilcox Co., supra, 351 U.S. 105, while holding that nonemployee organizers could be forbidden to solicit on company property when reasonable alternatives were available, made it clear that the employees in exercise of their rights are not to be judged by the same standards as nonemployees. Further, it cites Republic Aviation Corp. v. N. L. R. B., supra, 324 U.S. 793, as controlling with regard to employees. The third case, N. L. R. B. v. United Steelworkers of America, CIO, supra, 357 U.S. 357, 362, did not involve the validity of a no-solicitation rule, but rather the 'very narrow and almost abstract question' whether, when an employer engages in antiunion solicitation in a manner forbidden to his employees by an otherwise valid no-solicitation rule, it is an unfair labor practice to enforce the rule against them. In this context the Court held the consideration of available alternatives to be relevant. This is clearly distinguishable from a case where the justifiableness of the no-solicitation rule is in question, rather than the propriety of the employer's use of means he had forbidden to the employees."

gress intended the products of "collective bargaining" to supersede public law. "[T]here are limits to what a union or an employer may offer to extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. *Teamsters Union* v. *Oliver,* 358 U.S. 283, 296; *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 399-400." *United Mine Workers* v. *Pennington,* 381 U.S. 657, 665. *A fortiori* it does not mean that the parties may by agreement nullify the rights enacted by Congress in §§ 7 & 8(a)(1) to guarantee the viability of the entire system created by the Act. Yet that is the precise effect of the agreement here, because it nullifies the statutory "right [of employees] fully and freely to discuss" union affairs (*Thomas* v. *Collins,* 323 U.S. at 533), as declared in *Le Tourneau,* which is a cornerstone of the democratic process decreed by Congress for governing the industrial community. For that reason, it would undermine rather than support "the practice and procedure of collective bargaining" to permit a waiver of that right.

(c) This Court's decisions are uniform in their appreciation that the parties can not utilize the authority granted in §§ 8(a)(5) & (d) to "contravene the statutory policy" (*Brooklyn Savings Bank,* 324 U.S. at 704) of the Act by nullifying rights accorded by § 7 and safeguarded by §§ 8(a)(1)-(3). Consistent with the approach of *Brooklyn Savings Bank,* in *Radio Officers* v. *Labor Board,* 347 U.S. 17, 47 (1954) the Court held that:

> "The employer could not, without violating section 8(a)(3), discriminate in wages solely on the basis of [union] membership even though it had executed a contract with the union prescrib-

> ing such action * * * Such discriminatory contracts are illegal and provide no defense to an action under Section 8(a)(3)."

See also *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, 256; *Labor Board* v. *Rockaway News*, 345 U.S. 71, 78-79; *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 104-107; *Garment Workers* v. *Labor Board*, 366 U.S. 731, 736-737.

Where agreements varying the scope of statutory rights have been upheld, this has been done on the ground that the agreement comported with rather than "contravene[d] the statutory policy" of the NLRA. Both the Board (Bd. Br. pp. 11-12) and the Company (Co. Br. p. 18) rely on two classes of cases—those dealing with the right to strike during the term of a contract, e.g. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, and with the scope of bargaining during the term of an agreement, e.g. *Labor Board* v. *American Nat'l. Ins. Co.*, 343 U.S. 395—for their extravagant view of the extent to which collective agreements can work waivers of § 7 rights.

The no-strike-clause cases demonstrate the validity of our analysis, rather than undermine it. The House Report on the Wagner Act stated:

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

See also *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 187, 237.

And as Senator Taft added in 1947, "we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, *when a contract has expired and neither side is bound by a contract.*" 93 Cong. Rec. 3835, emphasis added; quoted in *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234-35, n.13.

Thus, after the consummation of an agreement the push of the law is to promote stability by restricting the occasions for strife. Section 203(d) promotes this end by encouraging grievance and arbitration procedures. Section 301 serves the same function by making collective agreements enforceable in court. And § 8(d) of the Act, as the Board stated in *C & S Industries*, 158 NLRB 454, 457, embodies the "statutory intent to stabilize during a contract term agreed-upon conditions of employment." This is the basis for the validation of no-strike commitments.

By the same token, *American Nat'l. Ins.* does not permit the utilization of § 8(a)(5) to waive rights guaranteed by other sections of the Act. It holds that § 8(a)(5), the only section of the Act relevant to the problem there presented, does not enact a *per se* ban on management functions' clauses. In so doing the Court noted:

> "Counsel for the Board do not contend that a management functions clause covering some conditions of employment is an illegal contract term.[15]

"[15] Thus we put aside such cases as National Labor Relations Board v. National Maritime Union, 175 F2d 686 (CA2d Cir. 1949) (bargaining for discriminatory hiring hall clause), where a party bargained for a clause violative of an express provision of the Act" 343 U.S. at 405.

Thus, *American Nat'l. Ins.* defines the content of the duty to bargain embodied in § 8(a)(5), and does so in a manner which accepts the proposition that § 8(a)(5) does not permit "clauses violative of an express provision of the Act." It does not sanction such clauses.

There are *no* cases in *this* Court which hold that a right created by Congress in the public interest, may be nullified by a private collective bargaining agreement.[2] And while there have been cases by the Board and the lower courts which, speaking the language of waiver, have held that because of the terms of a collective bargaining agreement a particular statutory right is unenforceable (Co. Br. pp. 4-16), these have not come to grips with the principle of sovereignty enunciated in *Brooklyn Savings Bank*. The results in some can perhaps be justified by a more precise analysis of the right involved, compare our discussion of *American Nat'l. Ins., supra*. But they cannot be justified under the rubric, sometimes enunciated, that cer-

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[2] The court below in *Armco Steel Corp.* v. *NLRB*, 344 F.2d 621 (C.A. 6), the precedent most heavily relied on in its opinion in this case, based its decision on the view that "contractual waiver of rights of equal or greater significance [than involved herein] has been upheld" (*id.* at 624). But none of the cases cited in *Armco* involved a waiver of statutory rights. Indeed, in one of the cases cited, *Radio Officers*, 347 U.S. 17, a contract limiting the right to be free of discrimination, as that term is defined in § 8(a)(3), was held to be unlawful. Of the others, only one even arguably dealt with a waiver of statutory rights, *Mastro Plastics*, 350 U.S. 270, discussed at p. 9 *supra*.

Of particular interest is *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, cited at 344 F.2d 625. That case involved bargaining about *contractual* seniority rights. On the other hand, where this Court has dealt with the statutory rights of veterans, it has said, in accord with the principle in *Brooklyn Savings Bank:*

> "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which

tain NLRA rights are "fundamental" (and therefore not subject to waiver), whereas other rights are "economic" (and hence nonfundamental and waivable). Congress drew no such distinction in the Act.[3] The varying results which the courts of appeals, and indeed over the years the Board, have reached with respect to the problem in this case is itself a caution as to the efficacy of this analysis.[4]

Congress has secured the veteran under the [Veterans' Preference] Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285; *Accardi* v. *Pennsylvania R.R. Co.*, 383 U.S. 225, 229.

[3] In *United Aircraft Corp.* v. *NLRB*, 440 F.2d 85, 95-97 (C.A. 2), the court considered the right to be free from anti-union discrimination to be fundamental and non-waivable, but held that a regulation of the time, place and manner of soliciting union membership on company property was nonfundamental and thus subject to the bargaining process so long as reasonable access to company property for that purpose is preserved. That analysis is consistent with our view, pp. 12-14, *infra*, as to what matters are bargainable, as well as with the Board's decision herein, because the rule here was not thus limited.

The same court's decision in *NLRB* v. *Spun-Jee Corp.*, 385 F.2d 379, 384, (C.A. 2) relied on at Co. Br. p. 18, while using the term "waiver" actually represents a failure by the charging union to trigger the employer's bargaining obligation. Any doubt on this score is removed by *Spun-Jee's* reliance on this Court's decision in *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292. That case would, therefore, be in point only if the union here had filed an unfair labor practice charge without requesting an opportunity to distribute literature.

[4] The Company too, at an early point in its discussion, embraces the fundamental/nonfundamental distinction, asserting, not surprisingly, that the right which it violated was not fundamental. Co. Br. pp. 5-7. However, by the end of the argument, the Company itself recognizes that "to distinguish economic gain from organizational activity is a distinction without a difference * * *." Co. Br. p. 20.

In sum, the only approach to this problem which conforms to the policy of the Act is that of the Eighth Circuit in *International Ass'n. of Mach. & A. Wkrs. Dist. No. 9* v. *NLRB*, 415 F.2d 113 (C.A.8). That court determined that the test of the legality of a collectively bargained provision is whether it imposes a "material restriction on [a statutory] right":

> "We recognize, as do the Sixth and Seventh Circuits, the desirability of promoting stability in collective bargaining relationships, but we believe that Article XV, Section 2, goes beyond that objective by prohibiting employees from exercising their right to attempt to change or support their current bargaining agent through the distribution of literature in nonwork areas during nonwork time. We believe such a prohibition to be contrary to the letter and spirit of the Act. Article XV, Section 1, imposes no material restriction on such right and is not violative of the Act." *Id.* at 115.

Article XV, § 2, which was held to be illegal because it materially interferred with statutory rights, is indistinguishable from the provision on which the Company relies here. See *id.* at 114.

2. All of this is not to say that there is no room whatever for collective bargaining on the subject of the distribution of union literature in plants. We have stressed the analogy between this § 7 right and the constitutional right to distribute literature on public thoroughfares. In the latter context this Court has stated:

> "Our cases make [it] clear, * * * that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously,

and government may allow only one. *Cox* v. *Hampshire,* 312 U.S. 569, 576 (1941). A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox* v. *Louisiana,* 379 U.S., at 554. * * *

The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' * * * The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-116, (footnotes omitted).

The rule stated in *Grayned* is indistinguishable from that stated in *Le Tourneau.* Both provide scope for practical adjustments of the competing interests tailored to particular circumstances. Thus, regulation of distributions at the work place or upon thoughfares implicate similar interests and the governing public law is in all essential respects the same. It follows, by a parity of reasoning, that an employer acting alone, or an employer and a union acting by agreement, like a local government, must in the regulations they adopt, abide by the further principle stated in *Grayned,* 408 U.S. at 116-117 (footnotes omitted):

"Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.' "

Thus, the Board correctly decided that the no-distribution rule maintained in this case was illegally overbroad since it was not "narrowly tailored to further the [Company's] legitimate interest." Under the NLRA, as under the Constitution, "[f]ree expression 'must not, in the guise of regulation, be abridged or denied' ". A collective agreement may "vary the protections" for the distribution of union literature afforded by § 7, within the limits already noted, "but it may not substantially abrogate employees' rights grounded" in that provision. Cf. *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37, 44.

3. The Company asserts that the Union "presumably receiv[ed] a *quid pro quo* in return for th[e] waiver which result[ed] in benefit to its unit members * * *" (Co. Br. p. 23), and objects that it is unfair to deprive the Company of the benefit of its bargain. A complete answer on this record is that no *"quid pro quo"* is identified although the Company "presumably" (*id.*) knew what it was giving up, if anything. And the answer in principle is that one private party does not gain a privilege to violate the law or to circumvent some other public policy by giving up something to another private party. See, e.g., the cases cited at p. 8 *supra*. It occurs not infrequently in labor-management relations that a particular term for which unions and employers have bargained and which benefits one of them is ultimately determined to be unlawful. The courts have not thereupon found themselves imprisoned by the stark choice between enforcing the illegal term and setting aside the entire agreement. Rather, as Mr. Justice Jackson held for this Court in *Labor Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79:

"The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here."

CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the Court of Appeals should be reversed.

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